STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2011
v FLOYD JULIUS LYTLE, Defendant-Appellant.	No. 298789 Wayne Circuit Court LC No. 10-001407-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v CAREY SULLIVAN LYTLE, Defendant-Appellant.	No. 299367 Wayne Circuit Court LC No. 10-001407-FC

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Defendants Floyd Lytle and Carey Lytle were tried jointly, both before the court. Floyd Lytle was convicted of unarmed robbery, MCL 750.530, carjacking, MCL 750.529a, unlawful imprisonment, MCL 750.349b, and assault with intent to do great bodily harm less than murder, MCL 750.84. Carey Lytle was convicted of unarmed robbery, carjacking, and unlawful imprisonment. They were each acquitted of armed robbery. The trial court sentenced Floyd Lytle to concurrent prison terms of 15 to 25 years for the carjacking conviction, 6 to 15 years each for the unarmed robbery and unlawful imprisonment convictions, and 6 to 10 years for the assault conviction, and sentenced Carey Lytle to concurrent prison terms of 7 to 15 years for the carjacking conviction, and 3 to 15 years each for the unarmed robbery and unlawful imprisonment convictions. Floyd Lytle appeals as of right in Docket No. 298789, and Carey Lytle appeals as of right in Docket No. 299367. We affirm each defendant's convictions and sentences.

The complainant, Antonio Hill, testified that defendants, brothers Floyd and Carey Lytle, robbed him of money and other valuables, carjacked his Ford Taurus, and forced him to withdraw money from his bank account from two different ATMs. He also testified that he was forcibly detained in their home between the two ATM withdrawals, and that he was beaten and stabbed in the hand. Hill testified that the ordeal began on the night of September 2, 2009, and ended the following morning. Defendants were arrested on September 3, 2009, but released the following day. The investigation was halted because Hill purportedly did not want to proceed with the prosecution. More than three months later, however, in December 2009, the investigation was reopened and defendants were charged with the offenses after the police received a report that a similar constellation of crimes were committed against a different victim. At trial, defendants argued that Hill was not a credible witness.

I. SUFFICIENCY OF THE EVIDENCE

Both defendants challenge the sufficiency of the evidence in support of their convictions. "A claim of insufficient evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v Lewis (On Remand)*, 287 Mich App 356, 365; 788 NW2d 461 (2010), quoting *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). "Circumstantial evidence and reasonable inferences may be satisfactory proof of the elements of a crime." *Lewis*, 287 Mich App at 365.

A. FLOYD'S CARJACKING CONVICTION

Defendant Floyd Lytle argues, through his appellate counsel, that he was improperly convicted of carjacking because there was no evidence that he intended to permanently deprive Hill of his vehicle.

Initially we disagree with the premise of Floyd's argument that an intent to permanently deprive a person of his or her vehicle is a necessary element of carjacking. The carjacking statute, MCL 750.529a, provides, in pertinent part:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.
>
> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

Thus, the statute uses the phrase "in the course of committing a larceny" to define the scope of the statute. The present version of 750.529a was enacted by 2004 PA 128, effective July 1, 2004. Before July 1, 2004,[1] subsection (1) of the carjacking statute provided:

> A person who by force or violence, or by threat of force or violence, or by putting in fear robs, steals, or takes a motor vehicle as defined in section 412 from another person, in the presence of that person or the presence of a passenger or in the presence of any other person in lawful possession of the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.

Interpreting the prior version of MCL 750.529a, this Court held in *People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998), that the prosecutor must prove "(1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear." As defined by the prior version of the statute, the offense of carjacking did not require an intent to permanently deprive the victim of the vehicle. *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998). Rather, the offense was established if the defendant acted with the intent of committing one of the proscribed acts of using force or violence, a threat of force or violence, or by putting a victim in fear. *Davenport*, 230 Mich App at 581. Floyd argues that, under the current statute, an intent to permanently deprive the victim of his or her vehicle is a necessary element of carjacking because the statute incorporates by reference the elements of larceny, which requires an intent to permanently deprive the owner of his property. *People v Langworthy*, 416 Mich 630, 657; 331 NW2d 171 (1982); *People v Pratt*, 254 Mich App 425, 427; 656 NW2d 866 (2002).

Although MCL 750.529a uses the term "larceny" to define the scope of the statute, it also defines the phrase "in the course of committing a larceny of a motor vehicle" as including "acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or *in an attempt to retain possession of the motor vehicle*." (Emphasis added.) The phrase "to retain possession" refers to a circumstance in which a defendant attempts merely to retain possession of a vehicle, regardless of an intent to permanently deprive the owner of the vehicle, or the length of the intended retention period. Given this special definition, we disagree with Floyd's argument that it was necessary to prove that he intended to permanently deprive Hill of his vehicle to convict him of carjacking.

Moreover, were we to read the statute as defendant suggests, we would still conclude that there was sufficient evidence to prove both that Floyd acted with an intent to permanently deprive Hill of his vehicle and with the intent of retaining possession. The evidence showed that Floyd and Carey acted together to seize Hill's vehicle from him. Hill testified that Carey took

[1] The statute was amended by 2004 PA 128, effective July 1, 2004.

the car keys from Hill's ignition without Hill's consent, after which Floyd instructed Carey to hide the car from Hill. Floyd told Hill that the vehicle would not be returned until Hill paid $500. Although Floyd's actions suggest a plan to return the vehicle if Hill "ransomed" it, his actions constitute retaining possession. Floyd also used violence and threats of violence against Hill to force Hill to drive the vehicle to a Comerica Bank ATM and to prevent Hill from regaining control of the vehicle and its keys, even after Hill gave the brothers as much money as he was able to withdraw. Additionally, the evidence that defendants kept the vehicle and keys when they released Hill supports an inference that defendants did not plan to return the vehicle. Floyd's subsequent conduct in advising Hill where he could find the car did not preclude the trial court, as the trier of fact, from finding that Floyd intended to retain possession of the vehicle, or to permanently deprive Hill of the vehicle, at the time the theft was committed. Accordingly, the evidence was sufficient to support Floyd's carjacking conviction.

B. FLOYD'S ADDITIONAL SUFFICIENCY-OF-THE-EVIDENCE CHALLENGES

Floyd presents additional arguments challenging the sufficiency of the evidence in a pro se Standard 4 brief. He contends that there was no larceny because Hill gave defendants temporary custody of his car as collateral for a debt that Hill owed defendants for crack cocaine. He also denies that force or violence was used to compel Hill to comply with defendants' demands for his car, money, and other valuables. He contends that the trial court's findings to the contrary are clearly erroneous because Hill was not a credible witness.

Floyd's arguments are based on a selective view of the testimony and requires us to ignore the trial court's credibility determination. In reviewing a claim challenging the sufficiency of evidence, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). The trial court found that Hill was a credible witness and we must defer to that determination. Hill's testimony, if believed, provided ample evidence that Floyd and Carey used force or violence, and the threat of violence against him and his family to take control of his car. Hill testified that Floyd unexpectedly beat him on the head and demanded to know when his disability payment would be deposited. Hill also stated that Floyd removed a wallet, cell phone, and watch from his person. When Carey left to go to the ATM, Floyd also made a remark to Hill suggesting that he would be shot if he did not cooperate. Hill stated that he did not believe that he could safely seek help at the gas station because Carey was watching him, and defendants knew where his family members lived. Hill also testified that Floyd stabbed him in the hand, and held a knife to his side during the second trip to an ATM. This testimony was sufficient to allow the trial court to find that Floyd used force or a threat of force to steal Hill's car and other valuables.

Floyd also argues that the evidence was insufficient to establish unlawful imprisonment. The trial court found defendants guilty of unlawful imprisonment under MCL 750.349b(1)(c), which provides that "[a] person commits the crime of unlawful imprisonment if he or she knowingly restrains another person" and "[t]he person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony." The court found that Hill was restrained against his will from at least 4:00 a.m. to approximately 11:30 a.m. Hill testified that he was held against his will during this time, and that Floyd stabbed him in the hand and held a knife against his throat, stomach, and groin. Floyd threatened to kill

Hill if he moved. Hill explained that defendants held him because his ATM agreement limited how often he could withdraw funds. Hill's testimony establishes that Floyd held him against his will to facilitate the robbery of Hill in order to steal his ATM proceeds. This evidence was sufficient to support Floyd's conviction.

C. CAREY'S CONVICTIONS

The focus of Carey's challenges to the sufficiency of the evidence is that there was insufficient evidence that he directly committed acts to support all elements of each offense of which he was convicted. However, his argument fails to recognize that he could be convicted as an aider and abettor. Under MCL 767.39, "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may . . . be prosecuted . . . as if he had directly committed such offense." A conviction under an aiding and abetting theory requires proof of the following elements:

> "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (citation omitted).]

A defendant may be charged as a principal but convicted as an aider and abettor. *People v Clark*, 57 Mich App 339, 343-344; 225 NW2d 758 (1975).

Carey contends that he cannot be guilty of carjacking because he did not use force to seize control of Hill's car. However, the evidence showed that Carey performed acts to aid the carjacking. He seized the keys from the ignition and did not return them, and he also hid the car from Hill. The evidence was sufficient to establish his guilt of aiding and abetting a carjacking.

The elements of unarmed robbery are: (1) a felonious taking of property from another; (2) by force, violence, assault or putting in fear; (3) while unarmed. MCL 750.530; *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). Although Carey denies that he assaulted Hill, the prosecutor presented evidence that Carey performed acts in aid of the robbery. The evidence showed that Carey accompanied Hill to the ATM at the gas station, warning him on the way that Floyd was "crazy." Carey also withdrew funds from Hill's bank account using the ATM card that he and Floyd obtained from Hill through the threat of force. Carey knew that Floyd was holding a knife to Hill during the trip to the Comerica Bank ATM. This evidence was sufficient to establish Carey's guilt of unarmed robbery under an aiding and abetting theory.

There was also sufficient evidence to find Carey guilty of unlawful imprisonment. Unlawful imprisonment may be proved by showing that a defendant "knowingly restrain[ed] another person" and "[t]he person was restrained to facilitate the commission of another felony." MCL 750.349b(1). Carey and Floyd clearly restrained Hill to facilitate the commission of unarmed robbery. While it is true that Hill testified that eventually Carey urged Floyd to let Hill go, this apparent change of heart came only after Carey had already either acted as a principal or

as an aider and abettor in threatening Hill, attacking him with Floyd, and holding him against his will. Carey knowingly participated in holding Hill against his will for hours before trying to convince his brother to let Hill go.

II. PREARREST DELAY

Both defendants argue that the trial court erred in denying their pretrial motion to dismiss based on prearrest delay.[2] "A challenge to a prearrest delay implicates constitutional due process rights, which this Court reviews de novo." *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

Defendants were initially released on September 3, 2009. They were subsequently rearrested and charged with the offenses in December 2009. Defendants argue that they were prejudiced by this delay of more than three months because surveillance photographs from a Comerica Bank security camera and a recording of Hill's 911 call were no longer available.

Dismissal of charges is appropriate when a prearrest delay has resulted in actual and substantial prejudice to a defendant's right to a fair trial and the prosecution intended the prearrest delay as a tactical advantage. *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009).[3] "Substantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charge in a manner that the outcome of the proceedings was likely affected." *Id.* Irretrievable loss of exculpatory evidence can establish substantial prejudice. *People v Adams*, 232 Mich App 128, 136; 591 NW2d 44 (1998), quoting *United States v Rogers*, 118 F3d 466, 474 (CA 6, 1997). Upon a finding of prejudice, the burden is on the prosecution to "persuade the court that the reason for the delay sufficiently justified whatever prejudice resulted." *Patton*, 285 Mich App at 237.

In this case, defendants did not establish prejudice. Defendants have not explained how the 911 recording could have helped their case at all, and the trial court, after a hearing, properly found that no prejudice arose from the lost surveillance photographs. Even if defendants could establish that they were prejudiced by the loss of the surveillance photographs and the 911 recording, the trial court did not err in finding that there was no evidence that the prosecution intended the delay as a tactical advantage. Officer Jones testified that the investigation was halted because Hill was not interested in pursuing prosecution of defendants. The investigation was reopened approximately three months later when the police received information that similar offenses were committed against another victim. Accordingly, the trial court did not err in denying defendants' motion to dismiss.

III. PROSECUTORIAL MISCONDUCT

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[2] Defendant Floyd raises this issue in his Standard 4 brief.

[3] Defendants rely on *People v Hernandez*, 15 Mich App 141, 147; 170 NW2d 851 (1969), but that case has been overruled as it applies to the present case. *People v Bisard*, 114 Mich App 784, 791; 319 NW2d 670 (1982).

Both defendants argue that misconduct by the prosecutor deprived them of a fair trial.[4] They contend that the prosecutor improperly elicited testimony at the evidentiary hearing that similar crimes were committed against a different victim, knowing that the judge who was presiding at the evidentiary hearing would also be presiding at trial. Because defendants did not raise this issue at either the pretrial hearing or at trial, this issue is not preserved. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Accordingly, our review is limited to plain error affecting defendants' substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Ericksen*, 288 Mich App 192, 199; 793 NW2d 120 (2010).

We find no merit to this issue. "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, defendants have not established that the prosecutor's questions to Officers Brown and Jones during the evidentiary hearing were anything more than a good-faith effort to admit evidence relating to the motion to dismiss that was then before the court. The evidence was relevant to the police department's reasons for reopening the investigation of Hill's criminal complaint after three months of dormancy. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). As previously indicated, one aspect of a prearrest delay claim is whether the prosecutor intended to gain a tactical advantage by delaying a defendant's arrest. *Adams*, 232 Mich App at 134. The officers' reasons for reopening the case were relevant to rebut any suggestion that the prosecution intentionally delayed pursuing charges against defendants to gain some strategic advantage. Accordingly, there was no plain error.

IV. LIMITATION ON CROSS-EXAMINATION

Both defendants argue that the trial court improperly limited their cross-examination of Hill, and thereby violated their constitutional right to confront their accuser.[5] They contend that the trial court erred by preventing them from questioning Hill about his mental illness and his drug use, which was relevant to his credibility. We conclude that this issue is preserved only to the extent that the trial court sustained the prosecutor's objection to Floyd's attempt to cross-examine Hill about the side effects of his prescription medication. Neither defendant made an offer of proof concerning any additional cross-examination concerning Hill's mental illness or other drug use, and neither defendant raised any Confrontation Clause issue below, leaving those issues unpreserved.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). We review unpreserved claims of evidentiary error for plain error affecting a defendant's substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

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[4] Defendant Floyd raises this issue in his Standard 4 brief.

[5] Defendant Floyd raises this issue in his Standard 4 brief.

The Confrontation Clause, US Const, Am VI, states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" The Michigan Constitution also guarantees this right. Const 1963, art 1, § 20. However, the Confrontation Clause does not grant a defendant an unlimited right to cross-examine witnesses. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). The trial court has discretion "to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a); *People v Paduchoski*, 50 Mich App 434, 438; 213 NW2d 602 (1973).

The trial court did not abuse its discretion in sustaining the prosecutor's objection to Floyd's question, "Would it surprise you to learn that a side effect of [Remeron] . . . ." The question was clearly a prelude to a statement regarding the side effects of Remeron without any foundation for the question. No evidence of the side effects of that medication had previously been introduced. The trial court did not preclude Floyd from offering evidence concerning the side effects of the drug, it only precluded defense counsel from asking the witness about alleged side effects without a foundation for the question. The trial court properly exercised its discretion, and there was no Confrontation Clause violation.

The record also does not support defendants' argument that they were prevented from cross-examining Hill about his mental history or other drug use. Defendants were permitted to elicit Hill's testimony that he suffered from a psychiatric condition, schizoaffective disorder, and that he was taking two prescription drugs for it at the time of the offense. Additionally, Hill admitted that he was consuming alcohol before the offense, and defendants were permitted to introduce the testimony of Lee Gay who claimed that Hill and defendants were smoking crack cocaine on the date of the offense. Although the trial court sustained objections to some questions because of improper form, it did preclude defendants from pursing the general subject matters relating to Hill's mental illness and drug use. Accordingly, we find no error, plain or otherwise.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Both defendants argue that they were denied the effective assistance of counsel at trial. Because neither defendant raised this issue in a motion for a new trial or request for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). To prevail on a claim of ineffective assistance of counsel, defendants must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different; and (3) the resultant proceeding was fundamentally unfair or unreliable. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009). A defendant claiming ineffective assistance must overcome the presumption that trial counsel's actions were sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A strategy is not ineffective merely because it did not work. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

A. FAILURE TO REQUEST DISQUALIFICATION OF THE TRIAL JUDGE

Defendant Floyd Lytle argues through appellate counsel and in his Standard 4 brief that trial counsel was ineffective for failing to move to disqualify the trial judge on the ground that the judge had previously presided at the evidentiary hearing on his motion to dismiss, and thus was exposed to testimony that the investigation against defendants was reopened after similar crimes were committed against another victim. Floyd argues that the trial judge's exposure to this information precluded a fair determination of his guilt or innocence at trial.

A trial judge is presumed to know the law. *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002). "Unlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel." *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Accordingly, absent a showing otherwise, it may be presumed that the trial judge knew that his findings of guilt could not be based on evidence outside the record. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). It may also be presumed that the trial court knew that other-acts evidence could not be admitted to prove the defendants' character or criminal propensity. MRE 404(b); *People v Mardlin*, 487 Mich 609, 615; 790 NW2d 607 (2010). Additionally, the trial court presumably knew that the officers had no personal knowledge of other acts committed by defendants, MRE 602, and that their evidentiary hearing testimony concerning a report by another victim was inadmissible to prove the truth of the matter asserted. MRE 801 and MRE 802. Floyd has not provided any basis for rebutting the presumptions that the trial court knew and understood the limited purpose of the officers' evidentiary hearing testimony and was aware that it could not be considered in determining Floyd's guilt or innocence at the bench trial.

Under these circumstances, it was not objectively unreasonable for defense counsel to rely on the trial judge's presumed understanding of the law and presumed knowledge of the differences between admissible and inadmissible evidence to determine that a motion for disqualification was not necessary. *People v Houston*, 179 Mich App 753, 756; 446 NW2d 543 (1989). Further, because the record provides no basis for believing that the trial judge's verdict was influenced by improper consideration, Floyd has not established that he were prejudiced by counsel's failure to file a motion for disqualification. Accordingly, this ineffective assistance of counsel claim cannot succeed.

B. CAREY LYTLE'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Defendant Carey Lytle raises several issues of ineffective assistance of counsel. He first argues that trial counsel was ineffective for not arguing that the trial court's limitations on the cross-examination of Hill violated the Confrontation Clause, and for not making an appropriate offer of proof in support of further cross-examination of Hill concerning his mental illness and drug use. As previously discussed in section IV, *supra*, the trial court did not preclude cross-examination on any subject matters, but only sustained objections to the improper form of some questions, which is permissible without violating the Confrontation Clause. Accordingly, defense counsel's failure to make a Confrontation Clause objection was not objectively unreasonable. Further, without a record of what additional questions Carey believes counsel should have asked Hill on cross-examination, or how any such additional questions could have

benefitted Carey's case, Carey has not established that he was prejudiced by counsel's alleged error.

Carey also argues that counsel was ineffective for failing to move for the appointment of an expert witness on schizoaffective disorder. Decisions concerning whether to call or question witnesses are matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A defendant claiming ineffective assistance of counsel based on the failure to call a witness must establish that he was deprived of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Here, Carey has not provided any evidence of what testimony an expert witness could have provided. Without any record of what expert witnesses were available, or how they might have testified, Carey has failed to establish that he was deprived of a substantial defense. Therefore, this claim cannot succeed.

Carey next argues that defense counsel was ineffective for failing to object to the other-acts testimony introduced through the police officers at the evidentiary hearing. As discussed in section III, *supra*, the officers' testimony was introduced for the limited relevant purpose of explaining why the investigation against defendants was reopened. Because that testimony was not improper, any objection would have been futile. Counsel is not ineffective for failing to make a futile objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Additionally, because a judge in a bench trial "is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence," *Wofford*, 196 Mich App at 282, and there is no basis in the record for believing that the trial court's verdict was based on improper considerations, Carey has not established that he was prejudiced by counsel's failure to object.

Carey also argues that counsel was ineffective for advising him to waive his right to a jury trial. There is no record concerning the basis for defense counsel's recommendation that Carey waive his right to a jury trial. Consequently, there is no basis for concluding that defense counsel failed to adequately advise Carey of the potential advantages and disadvantages of waiving a jury trial. Carey suggests that the other-acts testimony introduced at the evidentiary hearing was so prejudicial that he could not have received a fair bench trial before the judge who heard the evidence, but as previously discussed, the brief reference to the other-acts testimony at the evidentiary hearing did not deprive Carey of a fair trial. This claim of ineffective assistance of counsel therefore fails.

Carey also argues that counsel was ineffective for failing to move for separate trials, and for failing to object to Hill's testimony regarding various statements by Floyd. In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Severance is mandated under MCR 6.121(C) only when a defendant clearly and affirmatively demonstrates through an affidavit or offer of proof that his substantial rights will be prejudiced by a joint trial and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 345-346; 524 NW2d 682 (1994). "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id.* at 349 (citation omitted). Here, Carey has not established any basis for concluding that he was prejudiced by a joint trial. He and Floyd presented the same defense, namely, that Hill's

psychiatric condition and the combination of his prescription medications, alcohol, and cocaine made him an incredible witness. Floyd's defense witness, Gay, also gave testimony that was equally favorable to both defendants. Accordingly, the record provides no basis for believing that Carey was prejudiced by a joint trial. Thus, counsel was not ineffective for failing to move for separate trials.

We also disagree with Carey's argument that Hill's testimony regarding Floyd's statements during the offenses constituted inadmissible hearsay with respect to Carey, and thereby violated Carey's constitutional right of confrontation. The statements were not hearsay because they were not admitted to prove the truth of the matters asserted. MRE 801(c); *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). Rather, with respect to Carey, the statements were relevant to Carey's knowledge and intent when carrying out the offenses, and to show the effect of the statements on Hill and Carey. Further, there also was no Confrontation Clause violation because "the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007). "Thus, a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Id.* Because there was no basis for an objection, counsel was not ineffective for failing to object.

VI. CONCLUSION

For the foregoing reasons, we affirm defendant Floyd Lytle's convictions and sentences in Docket No. 298789, and Carey Lytle's convictions and sentences in Docket No. 299367.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher